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Supreme Court of the United States

October Term, 1949.

No. 660

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - Petitioner,

versus

BOND BROTHERS, - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY AND BRIEF IN SUPPORT THEREOF.

BLAKEY HELM,
Louisville, Ky.,
Attorney for Petitioner.

Of Counsel:
GILBERT BURNETT,
JOHN MOREMEN,
Louisville, Ky.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - - *Petitioner,*

v.

BOND BROTHERS, - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, Louisville and Jefferson County Metropolitan Sewer District, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky in the above cause which was entered October 18, 1949, and became final upon the denial by that Court on December 16, 1949, of a petition for rehearing (R. 67).

OPINION BELOW.

The opinion of the Court of Appeals of Kentucky, review of which is sought, has not been officially reported. A certified copy of the opinion will be found at pages 67 to 69 of the Record.

That judgment holds that respondent's contract for openings into a main sewer can be specifically enforced for free service from petitioner, a publicly-owned public utility. That holding follows a previous appeal, in which the Kentucky Court of Appeals had to, and did, consider and discuss two conflicting constitutional claims. The previous decision is in this Record, pages 42 to 54, and is reported in *Bond Brothers* v. *Louisville and Jefferson County,* 307 Ky. 689, 211 S. W. 2d 867.

This petition must, therefore, discuss the rulings in the earlier opinion, and the effect given to these rulings by the latest judgment of the Kentucky Court of Appeals.

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is founded on Section 1257 (3) of the revised Judicial Code (Title 28, U. S. Code). The validity of a State statute was drawn in question as being repugnant to the Constitution of the United States. The decision approving an exception to the State statute, holds that it violates the Federal Constitution. This exception results in a denial of equal protection of other users of public utility sewer facilities prohibited by the Fourteenth Amendment.

Section 76.090 Kentucky Revised Statutes authorizes charges against owners of all property served by the sewer facilities, and requires that they be uniform within the same classification. Recognizing constitutional rights under a pre-existing contract, the Chancellor enjoined collection of charges from respondent. The Court of Appeals affirmed this decision. Petitioner asks a writ of certiorari for review of that judgment.

SUMMARY STATEMENT OF MATTER INVOLVED.

This action was filed by respondent for a declaration of rights. Petitioner is a municipal corporation performing public utility services (K.R.S. 76.010). It provides sewer service on a use charge made against all property served (K.R.S. 76.090; see Appendix herewith).

Respondent owns land west of Louisville. One of petitioner's largest main sewers passes through this land and respondent has openings into it. In this action respondent asks a declaration that it does not have to pay therefor any sewer service charges. The basis of its claim is that its predecessor sold petitioner's predecessor an easement across the land now owned by respondent, and part of the consideration for this easement was a contract for free use of this sewer (for Contract see Exhibit A, R. 7-8).

The Chancellor held that the contract called only for connections, not free use. The Kentucky Court of Appeals reversed the Chancellor's interpretation of

the 1929 contract, holding the contract gave respondent the right to free use. Petitioner claimed then that even though the contract gave a right to free use of the sewer, the 1946 Metropolitan Sewer Statute makes further performance of this contract illegal, and now requires respondent to pay charges for use of these sewer facilities.

Respondent claimed that its contract right was protected by the Fourteenth Amendment to the United States Constitution. The opinion (307 Ky. 696) recognized that the making of sewer charges is an exercise of the police power, discussed possible limits on its exercise and particularly the protection to contract rights given by the Federal Constitution. That opinion also recognizes (p. 700) the principle that rate regulations of public utilities do not unconstitutionally impair existing contracts, and points out that the losing party in such contracts has a remedy of compensation therefor.

The final holding of that opinion was (p. 702): "that the appellant's contract cannot be abrogated or their vested rights destroyed by imposing the sewer service charges promulgated by the Metropolitan District without due compensation being made."

The Court of Appeals reversed the judgment for "consistent proceedings," but the Chancellor refused to take further proceedings either to protect respondent until compensation made, or to determine compensation, and entered a decree perpetually enjoining petitioner from charging respondent for use of petitioner's sewer facilities. The first opinion discussed the con-

stitutional questions, but the Chancellor's decree was the first holding directly refusing to recognize the validity of the State statute.

The Kentucky Court of Appeals then affirmed the Chancellor's decision. Its opinion holds that respondent can not be required to accept compensation for breach of contract or be deprived of the right to specific performance of its contract (R. 69). The effect of this last judgment of the Court of Appeals is that the contract right, protected by the Federal Constitution, supersedes the State statute, and prevents equal protection of sewer users.

QUESTIONS PRESENTED.

As petitioner is a public utility attempting to charge uniform rates to similar sewer users, the effect of the Kentucky Court of Appeals' ruling is to bring up two specific constitutional questions, which have been decided in its two opinions. These are:

1. Can a contract right for free use, valid when made, be legally enforced after enactment of a State statute requiring payment of charges from all property served by the sewers?

2. Can a public utility which has, pursuant to statute, fixed uniform charges for use of its sewers for sanitary sewage, discriminate between users by furnishing such service free to one substantial user?

REASONS FOR ALLOWANCE OF THE WRIT.

Construction of sewers in and around Louisville, Kentucky, was for some forty years performed by a separate municipal corporation, now out of existence, designated as the Commissioners of Sewerage. Upon completion, all sewers were turned over to the City of Louisville. It still owns them.

To provide for further construction and maintenance of sewers, the Kentucky Legislature in 1946 passed an Act (Chapter 104, Acts 1946), now Chapter 76 of the Kentucky Revised Statutes, authorizing organization of metropolitan sewer districts. The City of Louisville created such a district, designated as the Louisville and Jefferson County Metropolitan Sewer District, with rights and duties prescribed by that statute. The validity of this action has been upheld by the Courts. *Veail* v. *Louisville and Jefferson County Metropolitan Sewer District,* 303 Ky. 248, 197 S. W. 2d 413.

The entire sewer system of the City up to that time had been built with tax funds or bond issue proceeds paid or to be paid from City tax funds. The Veail case upheld the right of the petitioner to collect charges from all property in the City of Louisville, served by petitioner's facilities. Then that Court upheld the right of petitioner to fix charges for more than 100 users outside the City, who had paid a connection charge. *Louisville and Jefferson County Metropolitan Sewer District* v. *St. Matthews Sanitary Association,* 307 Ky. 207, 208 S. W. 2d 490.

The right to collect charges from two other large users outside the City in the same classification as respondent, was upheld in *Louisville and Jefferson County Metropolitan Sewer District* v. *Joseph E. Seagram & Sons,* and *same* v. *International Harvester Company,* 307 Ky. 413, 211 S. W. 2d 122. In that opinion the Kentucky Court says (307 Ky. 420):

> "Discrimination in rates or services is not permitted by municipalities any more than private utilities."

The statute specifically provides in K.R.S. 76.090 for charges to be collected from all property served by the facilities of such District. Petitioner operates a public utility. It is attempting to provide service on the same basis to all similar users. It must charge them the same rates.

It is even more important that equal protection to all customers be provided by a municipal corporation. Respondent has charged in this case that petitioner is attempting to abrogate a contract. Petitioner did claim that the contract did not entitle respondent to free use. That question has been eliminated. Petitioner could easily comply with the contract. But it believes that since July, 1947, when sewer use charges became effective under this statute, it has had no right to discriminate in favor of respondent.

While holding in other cases that such sewer charges must be paid by individual users, the Court of Appeals has in this case held that a contract supersedes the Constitutional duty against discrimination. We can not understand why this exception. The decision of

the Kentucky Court of Appeals requiring such discrimination directly conflicts with many decisions of this Court on this question. Petitioner needs help from this Court in its efforts to treat all similar customers alike. This decision must not establish a precedent for special contracts. Petitioner could not make such a contract now; it should not be permitted to perform one previously made.

PRAYER.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the Court of Appeals of Kentucky, to the end that the decision and judgment of that Court in this cause may be reviewed by this Court and the judgment of that Court be reversed.

BLAKEY HELM,
Louisville, Ky.,
Attorney for Petitioner.

Of Counsel:
GILBERT BURNETT,
JOHN MOREMEN,
Louisville, Ky.

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LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - - *Petitioner,*

v.

BOND BROTHERS, - - - - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

Respondent is successor in title to land owned by the Producers Wood Preserving Company. Through this land the Board of Sewerage Commissioners of Louisville in 1928 desired to construct a large, open outfall sewer. The condemnation proceedings were appealed to the Kentucky Court of Appeals by the owner, and reversed. Then the parties entered into a contract, in the form of a judgment.

This contract called for retention of $49,500 paid the land owner, a change to a closed sewer, right of the property owner to use space over sewer for storage of railroad ties and provision that the condemnor would

construct suitable openings into its main sewer. The particular provision reads as follows (R. 8):

> "6. Plaintiff stipulates and agrees to construct suitable openings or connections into its main sewer on either side thereof, for defendant's use in connecting its sewerage and or storm water or natural drainage from the defendant's existing property."

Respondent or its predecessor enjoyed free use of the outfall sewer for both natural drainage and sewerage, without challenge, until July, 1947. An Act of the 1946 Kentucky Legislature authorized creation of metropolitan sewer districts. Petitioner was organized under that Act. It succeeded to the possession and control of the sewer through respondent's property. Under authority of that Act, petitioner on June 16, 1947, adopted regulations providing for assessment of charges against all property using its sewer facilities. Respondent refused to pay any charges. It brought this action in equity for a declaration of rights. It asked that the regulation attempting to impose a charge upon it be held void, and that petitioner be enjoined from ceasing to serve respondent's property and from collecting charges from it. Petitioner's demurrer to the petition was overruled.

By a judgment entered November 5, 1947, the Chancellor interpreted the 1929 contract as providing for connection with, but not for free use of, the outfall sewer. The Chancellor held respondent liable for regular sewer service charges. The Kentucky Court of Appeals reversed this interpretation of that contract. Not until then did this case directly involve

Federal Constitutional questions. These do not appear in the petition. But with the interpretation of that contract, as made by the Court of Appeals, legality of future performance of this contract became involved.

The opinion on the first appeal recognizes the legislative right, by rate regulations, to impair existing contracts, but states that the party suffering has a remedy of recovering compensation. The opinion then holds that vested rights can not be destroyed without due compensation, and reversed this case "for consistent proceedings."

Upon a return of the case, the judgment in favor of petitioner was set aside. This being an action for declaration of rights, petitioner sought a declaration in accordance with the several principles announced by the Court of Appeals in its opinion. The Chancellor refused to permit an answer raising this question of due compensation to be filed, and entered judgment enjoining collection of charges from respondent (R. 63).

This new judgment of the Chancellor did not provide for protection of vested rights *until* due compensation made, as authorized by the opinion. Nor did it attempt to determine the loss suffered by respondent, as in the case which the Court of Appeals had cited, *Louisville and Nashville R. R. Co.* v. *Crowe,* 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (n. s.) 848. Instead the Chancellor gave an outright injunction against collection of sewer rates. This judgment was affirmed by the Kentucky Court of Appeals, which held that respondent could enforce specific performance of its contract, despite the State statute.

JURISDICTION OF COURT.

The jurisdiction of this Court is founded on Title 28, Section 1257 (3), United States Code. Petitioner sought to comply with a State statute requiring payment of charges by the owners of all property served by petitioner's facilities. Respondent asked a declaration of rights because of a contract under which it claimed right to free use. The Chancellor interpreted the contract as not giving such right. On appeal, however, the Court of Appeals held that the 1929 contract gave respondent this right to free use.

This ruling then brought before the Kentucky Court of Appeals a question as to supremacy between a contract right under the Federal Constitution and a State statute requiring payment of sewer charges by owners of all property served by the facilities. Before July, 1947, no sewer service charges were made. By a regulation adopted in June, 1947, sewer charges were provided pursuant to Section 76.090, Kentucky Revised Statutes.

Respondent claimed that Article One, Section Ten, and the Fourteenth Amendment to the Federal Constitution protected its contract right to free use of the sewer. The contract provided for openings into this sewer in connecting sewerage and storm water and natural drainage from the Producers Company's 170 acres of land. This right of use for storm water and natural drainage is not affected by the rate regulation or this litigation. Petitioner claims only that after the adoption of the June, 1947 regulation for charges

against all property served, compliance with that part of the 1929 contract as to sewerage became illegal.

The first opinion of the Kentucky Court of Appeals holds (307 Ky. 696) that such rate regulations "may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution." Then in discussing the taking of private property without due compensation, that opinion quotes from this Court's opinion in *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, 67 L. Ed. 322, 28 A. L. R. 1321. This quotation is based on the protection of property by the Constitution of the United States. The Court of Appeals' opinion then uses this case as the basis for its discussion of contract rights.

The opinion then cites *Hodges* v. *Snyder,* 261 U. S. 600, 67 L. Ed. 819, as authority for its holding that the Sewer District may not nullify a fixed and adjudicated right. It overlooks the holding therein as to change of a public right by subsequent legislation.

In recognizing petitioner's contentions the Opinion cites *Louisville & Nashville Railroad Company* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297, 34 L. R. A. (n. s.) 671, and Kentucky cases based upon it, to the effect that contracts like this one "are entered into subject to the reserved authority in the State to modify them in the interest of the public welfare, and that rate regulations do not unconstitutionally impair existing contracts between public service corporations and customers" (307 Ky. 700).

This principle should have decided this case, but at the close of its opinion the Court of Appeals says:

> "Without extending the opinion further—perhaps now beyond due bonds—we hold that the appellants' contract cannot be abrogated or their vested rights destroyed by imposing the sewer service charges promulgated by the Metropolitan District without due compensation being made.
>
> "The judgments are, therefore, reversed for consistent proceedings."

If the Chancellor had followed that principle as to enjoining collection of charges until compensation paid, or had required determination of damages for any loss suffered, petitioner would now have no constitutional question to present to this Court. When, however, the Chancellor issued a complete perpetual injunction against collection of charges from respondent, this did present a decision of constitutional questions adverse to petitioner. The Court of Appeals then on the second appeal interpreted its previous opinion as authorizing this injunction. Hence the highest Court in Kentucky has now specifically decided against petitioner two constitutional questions, one being in favor of a right claimed under the Federal Constitution as against validity of a State statute, the other denying equal protection of the laws.

Petition for certiorari is the only method by which petitioner may ask a review of these questions. Otherwise it must recognize this case as a precedent for violating a State statute and for discriminating between similar customers of a public utility.

Review of constitutional questions decided on the first appeal or on the second, or on both, can be considered by this Court, as the decision affecting petitioner's rights has only now become final. *Washington ex rel. Grays Harbor Logging Co.* v. *Superior Court of Washington,* 243 U. S. 251, 61 L. Ed. 702; *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212; *Urie* v. *Thompson, Trustee,* 337 U. S. 163, 93 L. Ed. 927.

ARGUMENT.

Prior to the 1946 session of the Kentucky Legislature, Kentucky laws had never authorized, for cities of the first class, service charges against users of sewer facilities. Respondent had theretofore used public sewer facilities, as did all others, without payment of use charges. An Act of that session (Chap. 104) provided for organization of metropolitan sewer districts.

Petitioner having been organized pursuant to said Act, proceeded under the Act to establish charges for use of sewer facilities. Filing of this action followed petitioner's effort to make these charges apply to all property served. In this the Court of Appeals of Kentucky has upheld petitioner as to all individual users, except for land mentioned in this contract. Petitioner's position in this case is definite, to-wit:

A. Prescribing sewer charges is an exercise of the police power;

B. Contract rights must not prevent uniform application of regulations under police power;

C. Exceptions in public utility rates cause denial of equal protection of the laws.

A. Prescribing Sewer Charges Is An Exercise of the Police Power.

The purpose of the 1946 Act appears in its first section (K. R. S. 76.010), that "In the interest of the public health and for the purpose of providing adequate sewer and drainage facilities . . . there may be created and established . . . a joint metropolitan sewer district . . ."

Section 19 of that Act (K. R. S. 76.210) provides in part:

> "It is hereby found and declared that the creation of the District and the carrying out of its corporate purpose is in all respects in the interest of the public health and is a public purpose; that the District is performing a governmental function in the exercise of its powers conferred upon it by this Chapter . . ."

Prior to the passage of that Act the Kentucky Court of Appeals had held that the establishment of a municipally owned sewer system, and the prescribing of charges for the use of such system, constitute the exercise of the police power. *Nourse* v. *City of Russellville,* 257 Ky. 525, 78 S. W. 2d 761; *Francis* v. *City of Bowling Green,* 259 Ky. 525, 82 S. W. 2d 804.

In *Baker* v. *City of Princeton,* 226 Ky. 409, 11 S. W. 2d 94, sewers were to be constructed by assessment against property benefited. A property owner claimed that payment of $20 for connection with an earlier public sewer relieved him of any further payment.

The opinion in that case says in part (226 Ky. 411):

> "It is not even claimed that there was a contract giving those who paid the connecting fee sewer privileges for all time to come. Even if there had been, it would have been beyond the power of the city to make. No rule of law is better settled than the police power may not be bartered away."

This passage was cited by the Kentucky Court of Appeals opinion in the St. Matthew Sanitary Association case, *supra* (307 Ky. 207), where 109 other individual users were held liable for sewer rental. The first opinion in this case (307 Ky. 695) also says it is undisputed that the city can not barter away its police power. That opinion recognizes that construction of sewers and drains is an object of the police power.

Decisions of this Court have also consistently held that the establishment of sewerage or drainage projects or prescribing charges for sewerage service is an exercise of the police power.

New Orleans Gaslight Co. v. *Drainage Comm.*, 197 U. S. 453, 49 L. Ed. 831;

CB&Q R. R. Co. v. *Illinois*, 200 U. S. 561, 50 L. Ed. 596;

Lake Shore & Mich. S. R. Co. v. *Clough*, 242 U. S. 375, 61 L. Ed. 374;

Carson v. *Sewer Commissioners of Brockton*, 182 U. S. 398, 45 L. Ed. 1151.

B. Contract Rights Must Not Prevent Uniform Application of Regulations Under Police Power.

The exercise of the police power in this case was authorized by Section 7 of the 1946 Metropolitan Sewer Act (K. R. S. 76.090). This section begins as follows:

> "(1) Upon taking and assuming control of such existing sewer and drainage system the district is authorized to establish a schedule of rates, rentals and charges, to be collected from *all* the *real property served* by the facilities of such district . . ." (Italics supplied.)

Pursuant to this statute the Board of the petitioner in June, 1947, adopted regulations governing sewer connections and sewer service charges. As respondent's land was served by these facilities, petitioner demanded payment from respondent of sewer charges at the regularly established rate for property in its classification. The next sub-section provides also as to the schedule of rates: "Such schedule shall be uniform for all property falling within the same classification."

In *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297, this Court held that a contract for free passenger transportation could not have been legally made after passage of the 1906 Amendment to the Interstate Commerce Act. Then this Court held that a prior contract for such free transportation, even if legal when made, could not thereafter be performed.

That decision of this Court reversed the Kentucky Court of Appeals. That Court soon thereafter had before it a case involving a similar contract for interstate free passes with the consideration therefor being an easement over the promisee's land.

In that case, *Louisville & Nashville Railroad Company* v. *Crowe,* 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (n. s.) 848, the Kentucky Court of Appeals followed this Court's holding in the Mottley case and held that performance of the contract for free transportation had become illegal. It permitted recovery of damages arising out of this non-performance.

Kentucky T. & T. Co. v. *Murray,* 176 Ky. 593, 195 S. W. 1119 was another case involving a contract for free transportation as consideration for an easement. The passes were to be intra-state, and for Murray's whole family. The case followed passage of the Kentucky anti-pass law in 1916. The decision is based on this Court's decision in the Mottley and other cases. It holds that the Kentucky statute was valid and its enforcement "will not be violative of the Constitution of the United States." The Traction Company could no longer legally issue these free passes.

The principles of the Mottley case and these two Kentucky cases are applicable here. Even if the respondent had a contract for free use of the sewer from 1929 to 1947, further performance of that contract became illegal upon adoption of the regulation in June, 1947, prescribing service charges.

The case involving use of free passes in Kentucky did not have to be brought to this Court. The prin-

ciples of the Mottley case were given effect by the Kentucky Court of Appeals. But numerous other cases involving State regulation of utilities and conflicting contract rights have been decided by this Court.

The right of a state commission to regulate rates or practices despite interference with an existing contract, has been specifically upheld by this Court:

As to transportation rates—

Producers Transportation Co. v. *Railroad Commission of California,* 251 U. S. 228, 64 L. Ed. 239;

Ortega Company v. *Triay, Receiver,* 260 U. S. 103, 67 L. Ed. 153.

As to electric rates—

Union Dry Goods Co. v. *Georgia Public Service Corporation,* 248 U. S. 372, 63 L. Ed. 309.

As to water rates—

Knoxville Water Co. v. *Knoxville,* 189 U. S. 434, 47 L. Ed. 887.

Changes in regulations as to expense of maintenance of underpasses, that disregard previous contracts, have been upheld.

C.B. & Q. R. Co. v. *Nebraska,* 170 U. S. 57, 42 L. Ed. 948;

Northern Pacific Co. v. *Minnesota, ex rel, Duluth,* 208 U. S. 583, 52 L. Ed. 630.

Even more important in this consideration, the legality of a police measure in aid of health, the con-

struction of sewers, which interfered with previous contract rights, was upheld in *New Orleans Gaslight Co.* v. *Drainage Comm. of New Orleans,* 197 U. S. 453, 49 L. Ed. 831.

C. Exceptions In Public Utility Rates Deny Equal Protection of Laws.

The statute in this case specifically provides that the schedule of charges shall be uniform for all property within the same classification. This case now presents no question as to classification. Respondent claims it should pay no sewer charges whatever.

By two amended petitions respondent raised in this action a question as to including property outside Louisville and property inside Louisville in the same classification. Respondent claimed in those pleadings that making this distinction between these properties constituted discrimination.

That issue of classification has been eliminated by the Kentucky Court of Appeals and by action of the District. But the very discrimination, to which respondent objected, has resulted from the ruling that respondent's use of the sewer shall be rent-free.

The Kentucky Court of Appeals upheld the right to make such a classification in *Louisville and Jefferson County Metropolitan Sewer District* v. *Joseph E. Seagram & Sons,* 307 Ky. 413, 211 S. W. 2d 122. But in determining the issues therein, the Kentucky Court of Appeals said (307 Ky. 420) that:

> "Discrimination in rates or services is not permitted by municipalities any more than private utilities."

In the case of *Louisville and Jefferson County Metropolitan Sewer District* v. *St. Matthews Sanitary Association,* 307 Ky. 207, 208 S. W. 2d 490, the Association had contracted for 109 property owners to connect with the City of Louisville sewers. The Association claimed, and the Chancellor held, that these sewer users did not have to pay use charges. The Kentucky Court of Appeals reversed this and upheld charges against all these users.

Contracts with municipalities as to sewer charges were held to be binding. The sewer statute authorizes such contracts. But all contracts for use of sewers by individual property owners have been held to be illegal, except this contract. We find no difference between respondent and other users, except in the greater use of sewers by respondent. But regardless of its size, permitting free-use by respondent would be discrimination in its favor.

Respondent would hardly contend that today it could contract for free sewer use for the future. As specifically held in the Mottley case, a contract which could not now be legally made, can not now be legally performed by a public utility.

In dealing with the question of local taxes on telephone equipment, this Court pointed out that the Fourteenth Amendment protects those within the same class against unequal taxation, stating specifically "all are entitled to like treatment." *Hopkins* v. *Southern California Telephone Company,* 275 U. S. 393, 403, 72 L. Ed. 329.

This Court held in *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 72 L. Ed. 770, that no discrimination could be made on length of mortgages alone.

In *Wheeling Steel Corporation* v. *Glander,* 337 U. S. 562, 93 L. Ed. 1234, this Court held that the taxing of intangibles of non-residents, but not of residents, denied equal protection of the laws.

In *Truax* v. *Corrigan,* 257 U. S. 312, 66 L. Ed. 254, this Court was dealing with protection of a restaurant business. The opinion says (pp. 332-333):

> "But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
>
> "The guaranty was aimed at undue favor and individual or class privilege on the one hand, and at hostile discrimination or the oppression of inequality on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

The opinion further states:

> "Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

So far the discrimination in favor of sewer users applies only to those claiming under this 1929 contract. But sewer charges were not being made when these sewers were built. If this decision stands, we do not have equal protection, and other sewer users through whose property any line passes will claim that free use was presumed.

RESUMÉ.

In the free pass cases the carriers were prohibited from complying with a discriminatory contract. In this case petitioner is being compelled to perform a discriminatory contract. To enable petitioner, a publicly owned utility, to serve all similar sewer users alike, certiorari should be granted. This decision of the Kentucky Court of Appeals is in conflict with this Court's decisions as well as with its own.

Respectfully submitted,

BLAKEY HELM,
Louisville, Ky.,
Attorney for Petitioner.

Of Counsel:
GILBERT BURNETT,
JOHN MOREMEN,
Louisville, Ky.

APPENDIX.

Kentucky Revised Statutes, Section 76.090, Subsections (1) and (2):

(1) Upon taking and assuming control of such existing sewer and drainage system the district is authorized to establish a schedule of rates, rentals, and charges, to be collected from all the real property served by the facilities of such district, and to prescribe the manner in which and time at which such rates, rentals, and charges are to be paid, and to change such schedule from time to time as the district may deem necessary, advisable or expedient. Such schedule may be based upon either (a) the consumption of water on premises connected with such facilities, taking into consideration commercial and industrial use of water; or (b) the number and kind of plumbing fixtures connected with such facilities; or (c) the number of persons served by such facilities; or (d) any combination thereof; or (e) may be determined by the district on any other basis or classification which the district may determine to be fair and reasonable, whether similar or dissimilar to those enumerated.

(2) Prior to the final adoption or modification of such schedule, the district shall adopt a proposed schedule and publish notice thereof once a week for three consecutive weeks in a daily newspaper published in the county having the largest circulation therein. The notice so published shall be dated as of the date of first publication thereof and shall state that the proposed or revised schedule of rates, rentals, and charges will remain open for inspection in the office of the district for thirty days from the date of said notice, and that objections thereto in writing may be filed during said period with the district by any person aggrieved thereby. The district shall examine and hear any and all such complaints, may modify the proposed schedule, and shall adopt and establish a final schedule within sixty days after the date of said notice; such schedule however shall not become final within a city of the first class, unless

and until it has received the approval of the legislative body of the city of the first class by ordinance approved by the mayor; provided, however, the schedule finally adopted shall be sufficient and adequate to cover the purposes of this chapter. Such schedule shall be uniform for all property falling within the same classification. The schedule so adopted and established shall thereafter be the rates, rentals, and charges for the use of the facilities of the district, until changed in the manner hereinbefore provided. Such schedule of rates, rentals, and charges shall be established and revised from time to time so as to produce aggregate revenues to the district sufficient (a) for the payment of the interest on and principal of all revenue bonds and other obligations of the district; (b) for the payment of all cost and expenses of operating and maintaining the sewer and drainage system of the district, including but not limited to the salaries, wages, and fees of all officers and employes of the district; and (c) for the payment of all cost of renewals and replacements of such system; provided however, that all such expenses, salaries, wages and fees necessary or incident to improvements for the account of which bonds are issued, may be included as a part of the cost of such improvements and paid from the proceeds of such bonds. The district may collect such sewer rates, rentals, and charges, or cause them to be collected and paid to it by such agencies as it may designate, and with whom it may make such contracts or arrangements as the district deems proper. The use of all monies of the district received from any and all sources is hereby limited exclusively and shall be devoted solely to the payment of all obligations of the district and board created by this chapter, and no funds from any sources authorized by this chapter shall be diverted to any other purposes than those in this chapter set forth.

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CHARLES ELMORE CROPLEY
CLERK

No. 660.

Supreme Court of the United States

October Term, 1949.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, Petitioner and Appellant Below,

versus

BOND BROTHERS, - - - - Respondent and Appellee Below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BOND BROTHERS,
Respondent,

By ERNEST WOODWARD,
Counsel for Respondent.

Of Counsel:

SQUIRE R. OGDEN,
Marion E. Taylor Building,
Louisville, Kentucky,

WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

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LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner and Appellant Below,*

v.

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Supreme Court of the United States

October Term, 1949.

No. 660.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - - *Petitioner,*

v.

BOND BROTHERS, - - - - *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your respondent respectfully shows:

I. STATEMENT OF THE CASE.

Louisville and Jefferson County Metropolitan Sewer District (herein called "Petitioner") seeks a review of a decision of the Court of Appeals of Kentucky holding valid and enforceable the reservation of a right to use a sewer for storm water and sewage draining, which reservation, made contemporaneously with the grant of an easement for the construction of a sewer, was embodied in a deed (R. 8) and a judgment (R. 44). The decision affects only the owners of a tract of land near Louisville, Kentucky.

The facts presented are not shown to appear in connection with any other tract of land situated in the area served by Petitioner, and the question presented is not one of any general importance in that area or elsewhere.

(1) The Facts.

In 1928 the tract of land to which the decision of the Kentucky Court relates was owned by Producers Wood Preserving Company (herein called "Producers"). Producers is the predecessor in title of Bond Brothers, the Respondent. There was a creek through the tract of land called Paddy's Run, which creek was used "for the disposal of a large volume of water utilized" in the plant operated by Producers (R. 43). In connection with the construction of said sewer by the Board of Sewerage Commissioners (herein called the "Board"), Petitioner's predecessor, "it was deemed necessary to run an open drainage channel following the course of Paddy's Run through the property" (R. 43).

Being unable to agree with Producers on the price to be paid for the easement for such drainage channel, eminent domain proceedings were brought by the Board for the purpose of acquiring the easement and determining the price to be paid therefor. The litigation was finally put at rest by judgment (R. 7) and a deed (R. 8) pursuant to which Producers (a) granted a perpetual easement to construct a covered concrete sewer[1] in connection with which provision was made for filling the valley of Paddy's Run to the level of

[1]The plan to construct an open drainage channel was changed. A covered concrete sewer was constructed.

high ground, and (b) reserved the right to drain its storm water and sewage into the concrete sewer, the Board agreeing "to construct suitable openings or connections into its main sewer" (R. 8, 13) for Producers' use. The deed (R. 13) expressly provides that "All grants * * * agreements, stipulations and covenants shall run with the land hereby granted and be for and to the successors and assigns of the parties hereto."

From 1929, the date the grant was made, until the creation of Petitioner in 1946 (R. 2) by act of the General Assembly of Kentucky, no effort was made to levy a charge upon Producers and its successors in title for the use of the sewer; but upon the creation of Petitioner, and the grant to it of power to establish and collect rates, rentals and charges for the use of sewers, Petitioner asserted it had been given the statutory power to charge Bond Brothers for the use of the sewer and thus destroy, without any compensation paid, the vested property right of Bond Brothers to use the sewer.

This action (R. 1) was filed by Bond Brothers for a declaration of its rights to the use of the sewer[2] and for an injunction to restrain Petitioner from ceasing to serve Bond Brothers' property with its sewer facilities. The trial court (R. 39) held that Producers and its successors in title did not, by the aforesaid judgment and deed, "acquire the right to use the sewers

[2]By its petition, Bond Brothers also challenged the right of Petitioner to enforce its proposal to charge higher rates for sewer service to Bond Brothers and others owning property situated outside the corporate limits of Louisville than the rates proposed to be charged to property owners within the City. That question, determined contrary to the claim of Bond Brothers, is not pertinent here.

without the payment of any sewer service charge that thereafter might be imposed by law." On appeal, that decision was reversed by the Court of Appeals of Kentucky by its opinion (R. 42-54), dated June 25, 1948. On the basis of the questions decided in that opinion, the determination must be made whether to grant the petition for writ of certiorari.

The precise questions decided by the Court of Appeals of Kentucky are:

1. The judgment and deed to which Producers and the Board were parties "granted Producers, for a valuable consideration, the use of this sewer and * * * such right and use passed to its successors in title to the land for similar industrial purposes" (R. 47).

2. The Petitioner may not, without paying compensation, destroy Bond Brothers' rights set forth in the deed and judgment to which Producers was a party, since there "is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment" R. 50).

3. Bond Brothers' right to the use of the sewer is protected by the provisions of Sections 1 and 13 of the Kentucky Constitution, which recognizes "as inalienable 'the right of acquiring and protecting property' and declares that the property of no citizen shall be taken 'or applied to public use without the consent of his representative and without just compensation being previously made to him' " (R.49).

II. SUMMARY OF ARGUMENT.

No question expressly decided by the Court of Appeals of Kentucky was such as to give this Court jurisdiction.

III. ARGUMENT.

Point (1). The Kentucky Court Has Not Decided a Federal Question.

As the first question presented (R. 43), the Kentucky Court determined as a matter of construction of the language used by the parties in the preparation of a deed and a judgment, that Producers reserved to itself the right to use, without charge, the sewer facilities for discharging its storm water and sewage (R. 47). The Kentucky Court thereupon decided the legal questions (1) that there was in fact no demand requiring the use of the police power to take property without compensation, and thus to nullify the deed and judgment by which such rights were reserved to Producers, and (2) that in any event, the right of Bond Brothers to the use of the sewer was protected by Sections 1 and 13 of the Kentucky Constitution which recognize as inalienable "the right of acquiring and protecting property" and declare that the property of no citizen shall be taken "or applied to public use without the consent of his representative and without just compensation being previously made to him."

There is thus no decision by the Kentucky Court of a Federal question.

Point (2). References to a Federal Question Were Merely Incidental to the Decision of Questions of Kentucky Law.

After deciding the questions as stated, the Kentucky Court called attention to the decision of this Court in *Pennsylvania Coal Company* v. *Mahon,* 260 U. S. 393, merely to show that this Court, consistent with the Kentucky Court's decision concerning the application of Sections 1 and 13 of the Kentucky Constitution, had recognized certain limitations upon the exercise of police power. The Kentucky Court also called attention to certain other decisions of this Court and other courts relating to recognized limitations upon the exercise by a sovereign of the police power. However, there is no language contained in the opinion which remotely supports a contention that the Kentucky Court undertook to decide a Federal question.

Certain it is that determination of a Federal question was not necessary to the decision of the case, and was not so considered by the Kentucky Court.

In *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52, this Court stated:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the

judgment as rendered could not have been given without deciding it."

Such requirement for jurisdiction of this Court is not met in this case.

Point (3). If it be Considered that a Federal Question Was Decided, Jurisdiction Will be Denied Since the Decision Rests on an Independent Ground.

In the *Lynch* case, there is the further statement:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not * * * and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Thus, if it be urged that the Kentucky Court has by implication decided a Federal question, nevertheless "the ground independent of a federal question," to-wit: that based upon Sections 1 and 13 of the Kentucky Constitution, is sufficient in and of itself to sustain the decision of the Kentucky Court.

It is clear that the decision of the Kentucky Court did not require it to determine any Federal question. At best, the right claimed by Bond Brothers is only remotely assignable to a Federal question. Under such circumstances, no Federal question is presented here. *Southwestern Bell Telephone Co.* v. *State of Oklahoma,* 303 U. S. 806; *Little* v. *Williams,* 231 U. S. 335; *Radio Station WOW* v. *Johnson,* 326 U. S. 120.

Point (4). The Decision of the Kentucky Court Is Not One of General Importance.

Under no circumstances can it be said that the State Court has decided a question of substance or one of general importance. The decision relates to one isolated tract of land in Jefferson County having appurtenant rights as a result of a deed and judgment not shown to be similar to any other tract of land in the restricted area served by Petitioner. Thus it is the narrow question presented is of no general importance in the Louisville area. Attention is not directed to any decision in any jurisdiction of a similar question, and therefore the question has no general importance or application. Clearly, the case is decided on grounds having no relation to any Federal question, and therefore the decision of the Kentucky Court will be accepted, whether it be considered right or wrong. *Nichol* v. *Cole,* 256 U. S. 222.

As the Kentucky Court said (R. 53), Bond Brothers' "predecessor reserved or retained a right which it had, *viz.,* to use the same channel for drainage purposes." Other property owners served by the sewer did not have such property right. The decision, applying provisions of the Kentucky Constitution, prevents Petitioner from confiscating Bond Brothers' property right. If the elimination of that right is necessary for the proper operation of the business of Petitioner, it may exercise its power of eminent domain[3] and compensate Bond Brothers for the value of its right.

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[3]KRS 76.080.

The principles relating to the right of a sovereign to exercise the police power, as announced by the Kentucky Court, are uniformly recognized by courts generally, and do not depart from decisions of this Court.

There is an express holding that sewer construction or operation is within the police power, the Court saying (R. 48):

> "To accomplish that objective, the full force of the power may be applied, and that may require that property rights be subordinated even though they are otherwise within the protection of the Constitution. * * * If the menace has been removed, public necessity and general welfare have been met and served, and the object has been accomplished, the question is whether the police power may be asserted years afterward, to destroy property rights or to abrogate a contract made by the same unit of government in order to raise revenue to operate and maintain the facilities."

The limitations on such power are stated as follows:

> "It is fundamental that such an extraordinary power is not without limitation for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution. The exercise of the power must have a substantial basis and cannot be made a mere pretext for actions that do not come within the scope. To state it another way, the action of the government may not arbitrarily invade liberty

or property rights under the guise of police regulation" (R. 48).

* * * * * *

"In the case at bar, the public demand or necessity is far from being great. There is in fact no imperious demand requiring the use of the police power to take property without compensation or destroy a contract or nullify a judgment."

IV. CONCLUSION.

The petition for writ of certiorari should be denied. No Federal question was decided by the Kentucky Court. The case was decided by the application of principles relating to construction of legal documents, and by the application of provisions of the Kentucky Constitution. The Kentucky Court correctly determined that the property right to use the sewer, a right appurtenant to the isolated tract of land and one not common to the owners of other property, should not be destroyed for the benefit of Petitioner and other property owners without compensation being made therefor.

Respectfully submitted,

ERNEST WOODWARD,
Counsel for Respondent.

Of Counsel:

SQUIRE R. OGDEN,
Marion E. Taylor Building,
Louisville, Kentucky,

WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky.

APPENDIX.

KRS 76.080 "General Powers of District."

The District created under the provisions of this chapter is empowered:

(1) To have jurisdiction, control, possession, and supervision, of the existing sewer and drainage system of such city of the first class; to maintain, operate, reconstruct, and improve the same as a comprehensive sewer and drainage system, and to make additions, betterments, and extensions thereto, within the corporate limits of such city of the first class and within the limits of the county containing such city beyond such city limits, and to have all the rights, privileges, and jurisdiction, necessary or proper for carrying such powers into execution. No enumeration of powers in this chapter shall operate to restrict the meaning of this general grant of power or to exclude other powers comprehended within this general grant.

(2) To prepare or cause to be prepared and to be thereafter revised and adopted, plans, designs, and estimates of costs, of a system to trunk, intercepting, connecting lateral, and outlet sewers, storm water drains, pumping and ventilating stations, disposal and treatment plants and works, and all other appliances and structures, which in the judgment of the Board will provide an effective and advantageous means for relieving such city of the first class and areas in the county in which such city is located outside the city limits which may be embraced in the District, from inadequate sanitary and storm water drainage and from inadequate sanitary disposal and treatment of the sewage thereof, or such sections or parts of such system as the Board may from time to time deem proper or convenient to construct, consistent with the plans and purposes of this chapter, and is authorized and empowered to take all such steps as the Board may deem proper and necessary to effect the purposes hereof.

(3) To construct any additions, betterments, and extensions, to the facilities of the District, by contract or contracts, or under, through, or by means of its own officers, agents, and employes. Provided, however, that before any construction of new sewers or the extension of any existing sewers is begun, the plans for all such projects shall, if said project is within the corporate limits of the City of Louisville, be first submitted to the Director of Works of the City of Louisville for approval by him, and, if so approved, then to be approved by ordinance adopted by the Board of Aldermen of the City of Louisville; and if said project is outside the corporate limits of the City of Louisville, the plans therefor shall then be first approved by the County Engineer of Jefferson County, and, if approved by him, then to be approved by proper action of the Fiscal Court of Jefferson County, except that if said project is without the corporate limits of the City of Louisville but within the corporate limits of any incorporated city, drainage district, or other political subdivision within Jefferson County, then such prior approval shall be obtained from the governing authorities of any such political subdivision or district.

(4) To establish, construct, operate, and maintain, as a part of the sewer and drainage system of the District, sewage treatment and disposal plants and systems and all the appurtenances and appliances thereunto belonging. Such sewage treatment and disposal plants may be located in the city, or beyond the limits of the city in the county in which the city is located, as the Board may deem expedient.

(5) To acquire and hold such personal property as the Board may deem necessary and proper for carrying out the corporate purposes of the District and to dispose of personal property when the District has no further need therefor.

(6) To acquire by purchase, gift, lease, or by condemnation, such real property or any interest, right, easement, or privilege therein, as the Board may determine necessary, proper and convenient for the corporate purposes of the District and to use the same so long as such corporate

existence shall continue, and same is necessary or useful for the corporate purposes of the District.

Condemnation proceedings may be instituted in the name of the District pursuant to a resolution of the Board declaring the necessity for the taking, and the method of condemnation shall be the same as provided in KRS 416.120. When the Board by resolution declares that any real property which it has acquired, or any interest therein, is no longer necessary or useful for the corporate purposes of the District, such real property and interest therein may be disposed of. (1946 c 104, § 6. Eff. 7-1-46.)

(7) To make by-laws and agreements for the management and regulation of its affairs and for the regulation of the use of property under its control and for the establishment and collection of sewer rates, rentals and charges, which sewer rates rentals and charges, applicable within the limits of a city of the first class, shall be subject to the approval, supervision and control of the legislative body of such city as hereinafter provided. (1948 c 180, § 2. Eff. 6-17-48.)

(8) To make contracts and execute all instruments necessary or convenient in the premises.

(9) To borrow money and to issue negotiable bonds and to provide for the rights of the holders thereof. (1946 c 104, § 6. Eff. 7-1-46.)

(10) To fix and collect sewer rates, rentals, and other charges, for service rendered by the facilities of the district, which sewer rates, rentals, and other charges, applicable within the limits of a city of the first class, shall be subject to the approval supervision and control of the legislative body of such city as hereinafter provided. (1948 c 180, § 3. Eff. 6-17-48.)

(11) To enter on any lands, waters and premises for the purpose of making surveys, soundings and examinations. (1946 c 104, § 6. Eff. July 1, 1946.)

Constitution of the Commonwealth of Kentucky as adopted September 28, 1891 as amended:

Section 1. Inherent and inalienable rights—All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

1. The right of enjoying and defending their lives and liberties.
2. The right of worshipping Almighty God according to the dictates of their consciences.
3. The right of seeking and pursuing their safety and happiness.
4. The right of freely communicating their thoughts and opinions.
5. The right of acquiring and protecting property.
6. The right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.
7. The right to bear arms in defense of themselves and of the state, subject to the power of the general assembly to enact laws to prevent persons from carrying concealed weapons.

Section 13. Jeopardy; property not to be taken without compensation.—

No person shall, for the same offense, be twice put in jeopardy of his life or limb, nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.